STATE OF MICHIGAN
IN THE SUPREME COURT

STEVEN J. VALCANIANT and
KATHLEEN A. VALCANIANT, his wife,

Plaintiffs-Appellants,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation, Jointly and Severally.

Defendant-Appellees.

Supreme Court No. 121141

Court of Appeals No. 227499

Case No. 98-025040-NI (H)
Hon. Nick O. Holowka

/

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PLAINTIFF/APPELLANT'S REPLY BRIEF TO DEFENDANT/APPELLEE'S BRIEF ON APPEAL

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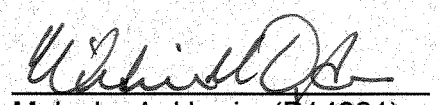
By: 

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INDEX OF AUTHORITIES

MISCELLANEOUS:

I. NESC STANDARDS ARE NOT APPLICABLE

Edison, in support of its position, relies upon safety standards as defined by the National Electric Safety Commission (NESC). This is evidenced by its presence in its brief at APPENDIX pages 1b - 2b. Specifically, on page 3 of Edison's brief, they refer to "air insulation" and "customary industry safety standard" (line 13).

Schultz v. Consumers Power Co., 443 Mich. 445, (1993), held:

> "Compliance with the NESC or an industry-wide standard is not an absolute defense to a claim of negligence. While it may be evidence of due care, conformity with industry standards is not conclusive on the question of negligence where a reasonable person engaged in the industry would have taken additional precautions under the circumstances. *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413, 422-423, 326 N.W.2d 372 (1982); 2 Restatement Torts, 2d, § 295A, p. 62. **An argument on the basis of industry standards, therefore, goes to the question whether a defendant breached its duty of ordinary care, not whether a duty existed.** If the plaintiff can convince a jury that a reasonably prudent company would have taken auxiliary measures beyond those required by industry standards, then the jury is clearly at liberty to find that the defendant breached its duty, regardless of the industry's guidelines." (Emphasis added).

Id., at 456,

Therefore, Mr. Valcaniant respectfully asks this Honorable Court, as mandated in Schultz, to properly ignore any reference to NESC findings, or other similar industry standards, in determining whether or not a legal duty exists.

II. DUTY TO A FORESEEABLE PLAINTIFF- PALSGRAF v LONG ISLAND R. CO.

Defendant cites in support of their arguments the venerable and oft cited case of Palsgraf v Long Island R. Co., 248 NY 339, 162 NE 99 (1928). Defendant relates Michigan's adherence to "the traditional/majority approach espoused by Justice

Cardozo . . . [in that] . . . the question of 'duty' is a threshold matter that must be addressed in terms of foreseeability **before** moving on to address such matters as actual or proximate cause. [footnote omitted]." (Defendant's Brief on Appeal, p. 42).

Funny though, Palsgraf is exactly part of what Judge Holowka relied upon in his opinion denying Defendant's Motion for Summary Disposition. Plaintiff's Brief on Appeal, at pages 32-3, clearly outlines Judge Holowka's sentiments as they are related to Justice (then Judge) Cardozo's historic comments.

Further, this Court has also acknowledged Justice Cardozo's position on this matter. In Anderson v Pine Knob Ski Resort, 664 N.W. 2d 756, 760, fn 2, (2003) (reviewing a statute precluding most liability for ski operators), Justice Taylor stated:

> "When one reflects on the roots of tort law in this country, it is clear that our legal forebears spurned such a 'hindsight' test and, instead, adopted a foreseeability test for determining tort liability. See the venerable *Palsgraf v. Long Island R Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), a case that every law student since 1928 has studied, and countless hornbooks and cases too numerous to require citation, where this is made clear. Said plainly, the common-law test for tort liability is not a 'could-it-have-been-avoided' test, rather, it is a 'was-this-foreseeable-to-a-reasonable-person-in-this-defendant's-position' standard."

Defendant cites Palsgraf for a proposition that there is "no duty to an unforeseeable plaintiff." (Id., at 41). The converse would necessarily have to be true. Just as Defendant's Brief expressly acknowledges from Palsgraf that there is no duty to an unforeseeable plaintiff, there doubtless is a duty which exists to a foreseeable plaintiff. The law does not entertain the notion of foreseeable accidents, harm or otherwise, as Defendant attempts to claim.

Next, Defendant admits that people (even experienced workers using high-

reaching equipment) do become electrocuted; admitting that these unknown and potential Plaintiff's are in fact foreseeable. (Defendant's Brief on Appeal, p. 43).

This is the very essence of what Plaintiff in the case at bar has been attempting to litigate and advocate throughout - - that it is **foreseeable** to Defendant that people do suffer **serious** harm from the product they sell.

It is undeniable that the **exact circumstances of this accident** were not reasonably foreseeable. As for that matter, the specific circumstances and nuances of any accident, (especially an electrocution) are rarely, if ever, foreseeable. However, according to the Defendant, it is absolutely foreseeable (***and admitted***) that people will and do become harmed (electrocuted) by the product that Defendant sells.

Given the admission that Defendant is aware that people do become electrocuted, the issue and focus necessarily then shifts to the question of if this "was-foreseeable-to-a-reasonable-person-(electricity provider)-in-this-defendant's-position." (See *supra* Anderson v Pine Knob Ski Resort, 664 N.W. 2d 756). Differently stated with Defendant admitting that they are aware that people do become electrocuted, could it have reasonably perceived that a person who comes into contact with a downed wire would suffer increased harm from a line's re-energization? Exactly the question that Judge Holowka posed and answered. **APPENDIX 2**, Trial Court decision on Motion to Dismiss, p. 23, lines 24-25, p. 24, lines 1 - 20.

On a passing note, of course "Detroit Edison will [n]ever be able to predict where or when such events will occur." (Defendant's Brief on Appeal, p. 43). Again, this is language sounding in "foreseeable **accidents**" . . . not "foreseeable **plaintiffs**."

Edison's libelous comments aside, even pettifoggers can identify this distinction. The recognition of "foreseeable plaintiffs" is exactly how Palsgraf and Anderson mandate that tort liability should be perceived. Defendant, whether knowingly or not, does concedes this to be true.

III. ISSUE PRESERVATION WAS NOT REQUIRED BY PLAINTIFF ON THE ARGUMENT THAT GRONCKI LACKS PRECEDENTIAL VALUE NOR THE ARGUMENT CONCERNING THE VOLUNTARY ASSUMPTION OF A DUTY

Initially, it should be remembered that Defendant was originally the appellant in this matter and therefore Plaintiff did not have a duty to preserve any issue from the trial court to the Court of Appeals. Plaintiff was successful at the trial court and did not require an appeal. What Defendant is really asserting with their "issue preservation" argument is: When any potential party that chooses to respond to an appeal to the Court of Appeals, they must be required to anticipate and predict how and why the Court of Appeals will rule in favor of the appellant (their opponent) in order to preserve a potential issue on a subsequent application for leave to appeal to the Michigan Supreme Court; less be barred from ever raising the issue. That, or a party must be able to predict all of this while at the trial level, then win on the merits, motion or final judgment, and then preserve a multitude of potential issues in front of the trial judge (whom will most likely politely remind that party that they won and the preservation of any issues is wholly unnecessary).

In further support that the Defendant's position is untenable, see Justice Young's comments in his concurring opinion denying a motion for reconsideration in Mack v City of Detroit, 654 N.W.2d 563, (2002) at page 565:

". . . the United States Supreme Court has sua sponte raised and decided issues neither raised nor briefed by the parties on many occasions and in some of the most important cases it has decided. See, for example, *Erie R Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In fact, that Court recently addressed an issue that was not briefed by the parties and was raised only indirectly at oral argument by the Court, notwithstanding a dissent critical of the Court's doing so. See *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (citing cases where the Court had previously done so, Justice O'Connor wrote for the majority that "[t]he Court has not always confined itself to the set of issues addressed by the parties"). Likewise, this entire Court recently decided an issue not raised or briefed by the parties. See *Federated Publications, Inc. v. Lansing*, 467 Mich. 98, 649 N.W.2d 383 (2002). As suggested above, the highest court's duty is to the law itself, not fidelity to the parties' vision (or lack thereof) of the law."

Mack v City of Detroit, 654 N.W. 2d 563, 565, (2002).

If this Honorable Court were concerned at all about "issue preservation" leave simply would not have been granted. One can not imagine that this Honorable (and very busy) Court would grant leave on this case in order to deny a party relief on the administrative grounds that issue(s) were not properly preserved.

IV. PUBLIC POLICY - THE LEGISLATURE'S PREROGATIVE.

"[J]udges are not in the business of 'granting prizes' to either side of a controversy; rather, they are in the business of interpreting the language of the law and letting the chips fall where they may . . . . . As Chief Justice Marshall recognized in *Marbury v. Madison*, nearly two centuries ago, **it is the responsibility of the judiciary to say what the law 'is,' not what it believes that it 'ought' to be**. [FN4] . . . FN4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)." (Emphasis added).

Justice Markman in, Michigan United Conversation Clubs v Secretary of State, 464 Mich 359, at page 395, (fn 3), and p. 397, (2001).

". . . **the constitutional arrangement in our state and nation reposes**

> **in the legislative body the role of making public policy**. . . The majority's view is that its approach to stare decisis, in overruling our prior erroneous interpretations of statutes, respects the democratic process by yielding to the constitutional authority of the Legislature its right to establish the state's policy. . . Nothing is clearer under our constitution than that the Legislature, when it has enacted a statute within its constitutional authority and, thus, has established public policy, must be obeyed even by the courts." (Emphasis added).

Justice Taylor in, Sington v Chrysler Corp., 467 Mich 144 at page 169, (2002).

Not to say that there is a statute that exists on this or even a remotely related topic. If there had been, surely Defendant's team of very competent and learned counsel would have brought any such statute to the forefront long ago in this matter.

However, the events and circumstances that occurred in Williams v Detroit, 364 Mich 231, 250 N.W.2d 1, (1961) should be viewed both as enlightening and guiding.

This very Court acknowledged Williams v Detroit in the case of Pohutski v City of Allen Park, 465 Mich 675, (2002). In Pohutski, Chief Justice Corrigan writing on behalf of the majority, as joined by Justices Weaver, Taylor, Young and Markman, stated:

> "In *Williams v. Detroit*, 364 Mich. 231, 250, 111 N.W.2d 1 (1961), Justice EDWARDS, joined by Justices T.M. KAVANAGH, SMITH, and SOURIS, wrote: 'From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case, we overrule preceding court-made law to the contrary.' Justice BLACK, in his concurring opinion, stated that governmental immunity would be abolished only for municipalities, not the state and its subdivisions. Id. at 278, 111 N.W.2d 1. As we noted in *Ross*, supra at 605, 363 N.W.2d 641, the Legislature enacted the governmental tort liability act in 1964 in reaction to Williams 'abolition of' common-law governmental immunity for municipalities, and in anticipation of a similar abrogation of immunity for counties, townships, and villages."
>
> Similarly, this Court should abolish and/or abandon any form of utility immunity

from liability and properly leave this topic to the Legislature to undertake public debate in order to create public policy on the issue. It is the Legislature's province to chose whether to enact any legislation in response, exactly as the Legislature responded to Williams by enacting the governmental tort liability act in 1964.

What the law "ought to be" is a decision for the Legislature. Michigan United Conversation Clubs v Secretary of State, 464 Mich 359 at 397. "The Courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequences would be the substitution of their pleasure for that of the legislative body." Alexander Hamilton, *The Judiciary Department, in* The Federalist Papers, No. 78, (1788).

To the extent that the Defendant is concerned and presents argument about however many square miles of service area and thousands miles of line, or power failures, blackouts and the like; it all sounds of "public policy." To that end, discussions such as these really only have two true places in the legal process; 1) in lobbying ones elected official(s) to draft/support/defeat proposed legislation; and 2) in opening and closing arguments at trial. The prior is a separate branch of government and the latter are separate phases of trial, which Defendant is trying vigorously to avoid.

There is no "prize" to be granted here and the "chips should fall where they may." 464 Mich 359 at 397. Further, and as Chief Justice Corrigan stated, writing on behalf of Justices Weaver, Taylor, Young and Markman: "it is not the province of this Court to make policy judgments or protect against anomalous results. [citation

omitted]." Hanson v Board of County Road Commissioners of the County of Mecosta, 465 Mich 492, 501-02, (2002);

V. CONCLUSION

The reality of this situation; this case is such: Groncki v Detroit Edison, 453 Mich. 644, 557 N.W.2d 289, (1996) is clearly a multifaceted and minimally guiding opinion at best. If Defendant were to be correct about the weight and significance of Groncki, one would expect such a case to be cited *ad nauseam* in the Appellate Reporters. However, it has been cited to only 3 times regarding the issue(s) at hand since its release in 1996.

The case at bar was granted leave by this Court for very good reasons, reasons which should be self evident to those of us involved. The strong inference to be drawn is that this Court has granted Plaintiff's case the highest of consideration to clearly and concisely rule upon the nature and extent of utility liability in the State of Michigan.

Given that we can all agree that utilities in the State of Michigan do enjoy a fair degree of "judicial immunity" from suit to begin with, to take a next and final step in advancing this immunity would be to grant utilities complete "judicial immunity." If that is the path we are heading down, Plaintiff asserts that the Supreme Court should consider, analyze and decide the situation just as Williams v Detroit, 364 Mich 231, 250 N.W.2d 1, (1961) was decided (as this Court recognized such an approach in Pohutski v City of Allen Park, 465 Mich 675, (2002), and in DeRose v DeRose, 666 N.W.2d 636, (2003)). The Supreme Court should abolish any form of immunity from

suit that currently exists, and properly leave it to the people's representatives in the Legislature to debate, weigh and decide if utilities should be granted any (or complete) immunity to civil suit. Or, let the oldest and most revered facet of the civil justice system decide the fait of the Plaintiff's claims - - the jury.

VI. RELIEF REQUESTED

Plaintiff/Appellant, MR. STEVEN J. VALCANIANT respectfully requests that this Honorable Court reverse the Court of Appeals unpublished opinion dated February 19, 2002 and remand these matters to the Trial Court to reinstate the findings of the Trial Court below, UPHOLD the March 17, 2000 and May 8, 2000 Orders Denying Defendant/Appellee's Motion for Summary Disposition and Denying Defendant/Appellee's Motion for Rehearing of the Trial Court's denial of Defendant's Motion of Summary Disposition; and allow this Plaintiff to have his day in Court.

Respectfully submitted,

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Dated: June 19, 2003

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STATE OF MICHIGAN)
) ss
COUNTY OF LAPEER)

GAYLE PRENDERGAST, being first duly sworn, deposes and says that on

October 2, 2003, she mailed via first class mail two (2) copies of

PLAINTIFF/APPELLANT'S REPLY BRIEF TO DEFENDANT/APPELLEE'S BRIEF ON APPEAL AND PROOF OF SERVICE, each properly addressed to:

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Gayle Prendergast
GAYLE PRENDERGAST

Valerie J. O'Neill
VALERIE J. O'NEILL, Notary Public
Lapeer County, Michigan
My commission expires: 02/05/05